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No. 91-687

# In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF MONTANA, PETITIONER

*v.*

DONALD GLENN IMLAY

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTION PRESENTED

Whether a convicted criminal defendant's privilege against compulsory self-incrimination is violated when his probation is revoked as a result of his refusal to accept responsibility for his crime.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the United States | 1 |
| Statement | 2 |
| Summary of argument | 4 |
| Argument | 7 |
| Requiring defendants to accept responsibility for their criminal conduct in order to qualify for lenient sentencing treatment does not constitute compulsion within the meaning of the privilege against compulsory self-incrimination | 7 |
| A. The Constitution does not require government to make exercise of the Fifth Amendment privilege cost-free | 8 |
| B. The history and purposes of the privilege against compulsory self-incrimination do not prohibit extending leniency to criminal defendants who accept responsibility for their conduct | 10 |
| C. Extension of leniency to criminal defendants who accept responsibility for their criminal conduct does not constitute a "penalty" imposed on criminal defendants who choose to exercise their right to remain silent | 17 |
| D. Government may withhold discretionary benefits from individuals who fail to prove they are entitled to those benefits even if their failure is attributable to the assertion of their Fifth Amendment privilege | 22 |
| Conclusion | 27 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976) | 16 |
| *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978) | 6, 17, 19, 21, 22 |
| *Brady* v. *United States*, 397 U.S. 742 (1970) | 6, 15, 17, 19 |

Cases—Continued: Page

*Brooks* v. *Tennessee*, 406 U.S. 605 (1972) ..... 8
*California* v. *Byers*, 402 U.S. 424 (1971) ..... 9, 10
*Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973) ..... 21
*Corbitt* v. *New Jersey*, 439 U.S. 212 (1978) .....6, 17, 18, 19, 27
*Couch* v. *United States*, 409 U.S. 322 (1973) .....7, 11, 13
*Counselman* v. *Hitchcock*, 142 U.S. 547 (1892) ..... 5, 11
*Fisher* v. *United States*, 425 U.S. 391 (1976) ..... 7, 13
*Gardner* v. *Broderick*, 392 U.S. 273 (1968) .....8, 20, 21
*Garrity* v. *New Jersey*, 385 U.S. 493 (1967) ..... 8, 20, 21, 25
*Gollaher* v. *United States*, 419 F.2d 520 (9th Cir.), cert. denied, 396 U.S. 960 (1969) ..... 15
*Griffin* v. *California*, 380 U.S. 609 (1965) ....4, 8, 9, 11, 16
*Jenkins* v. *Anderson*, 447 U.S. 231 (1980) .....5, 9, 15
*Kimm* v. *Rosenberg*, 363 U.S. 405 (1960) .....7, 24, 25
*Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977) ..8, 20, 21
*Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) .....8, 20, 21, 25
*Malloy* v. *Hogan*, 378 U.S. 1 (1964) ..... 5, 13
*McGautha* v. *California*, 402 U.S. 183 (1971) .....5, 9, 10
*Michigan* v. *Tucker*, 417 U.S. 433 (1974) ..... 10, 15
*Minnesota* v. *Murphy*, 465 U.S. 420 (1984) ..... 21
*Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990) ..... 15
*Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964) ..... 5, 14
*New York* v. *Burger*, 482 U.S. 691 (1987) ..... 14
*Orloff* v. *Willoughby*, 345 U.S. 83 (1953) ..... 7, 24
*Roberts* v. *United States*, 445 U.S. 552 (1980) ..... 15
*Schmerber* v. *California*, 384 U.S. 757 (1966) ..... 13
*Skinner* v. *Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) ..... 14
*Slochower* v. *Board of Education*, 350 U.S. 551 (1956) ..... 8
*South Dakota* v. *Neville*, 459 U.S. 553 (1983) ..... 10
*Spevack* v. *Klein*, 385 U.S. 511 (1967) .....4, 8, 9, 21, 25
*State* v. *Gleason*, 576 A.2d 1246 (Vt. 1990) ..... 19
*Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966) ..... 13
*Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280 (1968) .....8, 16, 20, 21

Cases—Continued: Page

*United States* v. *Frierson*, 945 F.2d 650 (3d Cir. 1991), cert. denied, No. 91-6849 (Mar. 23, 1992) .. 2
*United States* v. *Gordon*, 895 F.2d 932 (4th Cir.), cert. denied, 111 S. Ct. 131 (1990) ..... 2
*United States* v. *Jackson*, 390 U.S. 570 (1968) ..... 8, 9
*United States* v. *Monia*, 317 U.S. 424 (1943) ..... 7
*United States* v. *Mourning*, 914 F.2d 699 (5th Cir. 1990) ..... 2, 23
*United States* v. *Ignancio Munio*, 909 F.2d 436 (11th Cir. 1990), cert. denied, 111 S. Ct. 1393 (1991) ..... 2
*United States* v. *Oliveras*, 905 F.2d 623 (2d Cir. 1990) ..... 2
*United States* v. *Perez-Franco*, 873 F.2d 455 (1st Cir. 1989) ..... 2
*United States* v. *Piper*, 918 F.2d 839 (9th Cir. 1990) (per curiam) ..... 2
*United States* v. *Rogers*, 921 F.2d 975 (10th Cir.), cert. denied, 111 S. Ct. 113 (1990) ..... 2
*United States* v. *Rylander*, 460 U.S. 752 (1983) .... 7, 25
*United States* v. *Washington*, 431 U.S. 181 (1977) .. 7, 15
*Williams* v. *Florida*, 399 U.S. 78 (1970) ..... 9

Constitution, statutes and rule:

U.S. Const.:

Amend. IV ..... 14
Amend. V ..... *passim*

Mont. Code Ann. (1989):

§ 45-5-502(3) ..... 2
§ 46-18-201(1) ..... 22

Sentencing Guidelines:

§ 3E1.1 ..... 2
§ 3E1.1, Application Note 1(c) ..... 19
§ 3E1.1(a) ..... 2

Miscellaneous:

8 *Wigmore on Evidence* (McNaughton rev. ed. 1961) ..... 13

Miscellaneous—Continued: Page

57 Fed. Reg. (1992):

p. 90 ..... 2
pp. 103-104 ..... 2

Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671 (1968) ..... 12, 13

L. Levy, *History and Judicial History: The Case of the Fifth Amendment*, in *Constitutional Opinions: Aspects of the Bill of Rights* (L. Levy ed. 1986) ..... 5, 12

L. Levy, *Origins of the Fifth Amendment* (1968) .... 11

Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949) ..... 11

R. McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193 ..... 13

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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### INTEREST OF THE UNITED STATES

This case presents the question whether the Fifth Amendment permits sentencing courts to revoke probation when a convicted criminal defendant's refusal to admit his guilt prevents him from complying with a condition of his probation. More generally, the case involves the validity of sentencing determinations made in part on the basis of a convicted defendant's willingness to accept responsibility for his criminal conduct. The United States has a strong interest in establishing the constitutionality of such sentencing

determinations. Pursuant to United States Sentencing Guidelines § 3E1.1(a), a defendant convicted of a federal crime is granted a two-level reduction in his offense level if he "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." [1] Some courts of appeals have suggested that Section 3E1.1 would run afoul of the constitutional privilege against compulsory self-incrimination if construed to require acceptance of responsibility for crimes other than the offense of conviction,[2] while others have rejected that contention.[3] The Court's decision in this case may provide guidance to the lower courts in determining the validity and proper scope of Section 3E1.1.

## STATEMENT

1. Respondent Donald Glenn Imlay was charged with felonious sexual assault on a seven-year-old girl, in violation of Mont. Code Ann. § 45-5-502(3) (1989).

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[1] The Sentencing Commission has published for comment a proposed amendment to Guidelines § 3E1.1 that would provide a one-level reduction in offense level to defendants who admit their culpability at any time, including after trial. See 57 Fed. Reg. 90, 103-104 (1992).

[2] See, *e.g.*, *United States* v. *Oliveras*, 905 F.2d 623, 626-628 (2d Cir. 1990); *United States* v. *Perez-Franco*, 873 F.2d 455, 462-463 (1st Cir. 1989); cf. *United States* v. *Piper*, 918 F.2d 839, 840-841 (9th Cir. 1990) (per curiam); *United States* v. *Frierson*, 945 F.2d 650 (3d Cir. 1991), cert. denied, No. 91-6849 (Mar. 23, 1992).

[3] See, *e.g.*, *United States* v. *Rogers*, 921 F.2d 975, 982-983 (10th Cir.), cert. denied, 111 S. Ct. 113 (1990); *United States* v. *Mourning*, 914 F.2d 699, 706-707 (5th Cir. 1990); *United States* v. *Ignancio Munio*, 909 F.2d 436, 439-440 n.4 (11th Cir. 1990); *United States* v. *Gordon*, 895 F.2d 932, 936-937 (4th Cir. 1990).

Respondent testified in his defense at trial and denied any wrongdoing, but he was convicted. Pet. 3; Pet. App. 17a.

The trial judge sentenced respondent to five years in prison. Finding that respondent's offense was an isolated incident and that respondent was suffering from medical problems, the judge suspended the prison sentence and placed respondent on supervised probation. The probation was conditioned on respondent's enrollment in and successful completion of a sexual therapy and counseling program. Pet. App. 18a-20a.

Respondent attempted to comply with the requirement that he obtain therapy, but he was unable to qualify for any outpatient sexual offender treatment program offered in Montana because he refused to acknowledge that he had committed the crime for which he had been convicted. Pet. App. 23a-24a. On the prosecution's motion to revoke probation, the court concluded that respondent "has violated the condition of his suspended sentence by not enrolling (not being amenable to treatment and hence, not acceptable into an out-patient treatment program) in a sex offender treatment program." *Id.* at 24a. The court noted that the requirement that respondent obtain treatment was "the most important condition on [his] suspended sentence." *Ibid.* Because the court found that "the only viable alternative is an in-patient program," and that the only in-patient sex offender treatment program in Montana was located in the Montana State Prison, *ibid.*, the court revoked respondent's probation and ordered him to serve his five-year prison sentence, *id.* at 24a-25a.

2. The Montana Supreme Court reversed. Pet. App. 1a-15a. The court framed the issue before it in

the following terms: "Can a criminal defendant, as a condition of a suspended sentence, be compelled to admit that he is guilty of the crime of which he has been accused and convicted?" *Id.* at 2a. Noting a difference of opinion on that issue in its own precedents and among the federal courts of appeals, *id.* at 9a-14a, the court concluded that the better rule was to "prohibit augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination." *Id.* at 15a. The court reasoned that respondent was "being subjected to a penalty that he would not otherwise be subjected to if he would simply admit his guilt." *Id.* at 14a. According to the court, respondent still had the right to challenge his conviction by collateral attack, and that right "would be rendered meaningless" if he were "compelled to admit guilt as a condition to his continued freedom." *Ibid.* Moreover, the court observed that respondent would have been forced to incriminate himself on the crime of perjury in order to qualify for treatment, because he had testified in his defense at trial. *Ibid.*

## SUMMARY OF ARGUMENT

A. Not all burdens on a criminal defendant's privilege against compulsory self-incrimination constitute impermissible "compulsion" within the meaning of the Fifth Amendment. Some of this Court's cases suggest that the Amendment forbids government to make assertion of the privilege "costly," see, *e.g.*, *Griffin* v. *California*, 380 U.S. 609, 614 (1965); *Spevack* v. *Klein*, 385 U.S. 511, 515 (1967) (plurality opinion), but the Court has made clear that criminal defendants may, in appropriate circumstances, be required to choose between their right to remain

silent and another right or benefit. *Jenkins* v. *Anderson*, 447 U.S. 231 (1980); *McGautha* v. *California*, 402 U.S. 183 (1971).

B. The question whether the Fifth Amendment bars a particular governmental burden on a defendant's assertion of the privilege against compulsory self-incrimination must be answered by reference to the history and purposes of the privilege and the countervailing governmental interests justifying the burden. As a historical matter, the privilege protected individuals from government efforts to force them to assist in the investigation and prosecution of criminal charges against them, but did not forbid the denial of government benefits to those who chose to remain silent. See *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892); L. Levy, *History and Judicial History: The Case of the Fifth Amendment*, in *Constitutional Opinions: Aspects of the Bill of Rights* 208 (L. Levy ed. 1986).

The central purpose of the privilege is to ensure that government "may not by coercion prove a charge against an accused out of his own mouth," *Malloy* v. *Hogan*, 378 U.S. 1, 7-8 (1964). The practice of denying lenient treatment to convicted criminal defendants who refuse to accept responsibility for their conduct does not offend that central purpose, because it does not force defendants to confess their guilt or present them with the "cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

The governmental interests justifying the challenged practice are legitimate and substantial. It is entirely appropriate to reward a convicted defendant with leniency when he admits his guilt, because the act of acceptance of responsibility demonstrates "that

he is ready and willing * * * to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Brady* v. *United States*, 397 U.S. 742, 753 (1970). Moreover, the justification for encouraging acceptance of responsibility is unrelated to any criminal investigative or prosecutive purpose.

C. Extension of leniency to criminal defendants who accept responsibility for their criminal conduct does not constitute a "penalty" imposed on those defendants who choose to remain silent. The sentencing practice at issue in this case is closely analogous to the practice of plea bargaining, in which the State encourages guilty pleas by promising lenient treatment at sentencing. This Court has repeatedly upheld the validity of plea bargaining despite the burden it imposes on the exercise of the privilege, see, *e.g.*, *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978); *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978); *Brady* v. *United States*, 397 U.S. 742 (1970), and there is no basis for reaching a different result in the circumstances of this case.

D. Respondent bore the burden of demonstrating his qualification for continued enjoyment of probation, and he failed to satisfy that burden when he chose to remain silent instead of accepting responsibility for his crime. The revocation of respondent's probation was not, therefore, a punishment for his assertion of the privilege but rather a legitimate consequence of his failure to demonstrate his qualification for further lenient treatment. The Fifth Amendment is not violated when an individual's claim to a government benefit is rejected because his assertion of the privilege prevents him from establishing his

entitlement to that benefit. See *Kimm* v. *Rosenberg*, 363 U.S. 405 (1960) (per curiam); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); see also *United States* v. *Rylander*, 460 U.S. 752 (1983).

## ARGUMENT

### REQUIRING DEFENDANTS TO ACCEPT RESPONSIBILITY FOR THEIR CRIMINAL CONDUCT IN ORDER TO QUALIFY FOR LENIENT SENTENCING TREATMENT DOES NOT CONSTITUTE COMPULSION WITHIN THE MEANING OF THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." As this Court has observed, "[t]he Amendment speaks of compulsion," *United States* v. *Monia*, 317 U.S. 424, 427 (1943), and thus "[t]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Fisher* v. *United States*, 425 U.S. 391, 397 (1976). See *United States* v. *Washington*, 431 U.S. 181, 187-188 (1977) ("The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions. * * * The constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony."); *Couch* v. *United States*, 409 U.S. 322, 328, 336 (1973). The threshold question, therefore, is whether respondent has been subjected to constitutionally cognizable compulsion aimed at forcing him to waive his Fifth Amendment rights.

### A. The Constitution Does Not Require Government To Make Exercise Of The Fifth Amendment Privilege Cost-Free

This Court has held that some government-imposed burdens on the exercise of a defendant's privilege against compelled self-incrimination are sufficiently severe, in light of the policies served by the privilege and the competing governmental interests at stake, to constitute compulsion within the meaning of the Fifth Amendment. Thus, in a line of cases beginning with *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), and extending through *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977), the Court established and reaffirmed the principle that "answers elicited upon the threat of the loss of employment are compelled" within the meaning of the Fifth Amendment. *Lefkowitz* v. *Turley*, 414 U.S. 70, 85 (1973).[4] Likewise, in *Griffin* v. *California*, 380 U.S. 609 (1965), the Court concluded that "comment on [a criminal defendant's] refusal to testify * * * is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614.[5] See also *Brooks* v. *Tennessee*, 406 U.S. 605 (1972) (invalidating rule requiring defendant to testify as first defense witness at trial or not at all); *United States* v. *Jackson*, 390 U.S. 570 (1968) (invalidating jury-imposed death penalty

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[4] See *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280 (1968); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Spevack* v. *Klein*, 385 U.S. 511 (1967); see also *Slochower* v. *Board of Education*, 350 U.S. 551 (1956).

[5] Justice Stewart, joined by Justice White, dissented in *Griffin*, stating: "I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel." 380 U.S. at 620.

provision of Federal Kidnaping Act because it unduly pressured defendants to plead guilty in order to avoid possibility of death sentence).

There is language in some of these "penalty" cases that suggests that any government action "which makes assertion of the Fifth Amendment privilege 'costly' " constitutes compulsion within the meaning of the Fifth Amendment. *Spevack* v. *Klein*, 385 U.S. 511, 515 (1967) (plurality opinion); see, *e.g.*, *Griffin* v. *California*, 380 U.S. at 614. The Court, however, has not applied that language rigidly in cases involving other burdens on the exercise of the Fifth Amendment privilege. To the contrary, the Court has made clear that the criminal justice system may lawfully create disincentives for the exercise of the Fifth Amendment privilege. For example, a defendant's pre-arrest decision to exercise his Fifth Amendment privilege rather than go to the police may be used to impeach his testimony at trial, despite the risk that the assertion of the privilege will be discouraged as a result. *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). Similarly, a defendant may be compelled to disclose to the government the substance of his alibi defense prior to trial or be barred from presenting the defense, despite the claim that such a rule forces the defendant to provide information that could assist the State in convicting him. *Williams* v. *Florida*, 399 U.S. 78 (1970). And a defendant's exercise of his right to remain silent at trial may be conditioned on his waiver of the opportunity to testify on matters affecting his sentence. See *McGautha* v. *California*, 402 U.S. 183 (1971).

In short, "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.' " *Jenkins* v. *Anderson*, 447 U.S. at 236 (quoting *Chaffin* v. *Stynchcombe*, 412

U.S. 17, 30 (1973)). "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha* v. *California*, 402 U.S. at 213 (citation omitted). See also *South Dakota* v. *Neville*, 459 U.S. 553, 564 (1983).

### B. The History And Purposes Of The Privilege Against Compulsory Self-Incrimination Do Not Prohibit Extending Leniency To Criminal Defendants Who Accept Responsibility For Their Conduct

The question whether a government-imposed burden on the Fifth Amendment privilege rises to the level of constitutionally proscribed compulsion cannot be answered by reference to the simple assertion that criminal defendants may not be penalized for exercising their Fifth Amendment rights. Rather, the inquiry requires consideration of the extent to which a particular burden implicates the interests protected by the Fifth Amendment privilege. As Justice Harlan said for the Court in *McGautha* v. *California*, "[t]he threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." 402 U.S. at 213. In making that determination, the Court has looked to "the historical origins of the privilege, particularly the evils at which it was to strike." *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974).

1. An examination of the historical underpinnings and purposes of the Fifth Amendment privilege provides scant support for an interpretation that would forbid courts to require acceptance of responsibility as a condition of lenient sentencing treatment. "His-

torically, the privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's own mouth. The Court has thought the privilege necessary to prevent any 'recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'" *Couch* v. *United States*, 409 U.S. 322, 327 (1973).[6] Thus, the focus of the privilege has always been on government actions aimed at forcing individuals to assist the government in gathering incriminating evidence for use against them. See *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892) ("The object was to insure that a person should not be compelled,

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[6] As Justice Stewart observed in dissent in *Griffin* v. *California*, "the procedures which historically gave rise to the Fifth Amendment guarantee" were of a different order entirely from indirect burdens on the privilege of the type at issue in this case:

> When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.

380 U.S. at 620 (Stewart, J., joined by White, J., dissenting). By the Eighteenth Century, the privilege had expanded beyond its roots, but its scope was still quite narrow. See L. Levy, *Origins of the Fifth Amendment* 325 (1968) ("The principle * * * was restrict[ed] narrowly to prohibition of the oath [*ex officio*] and to the right of the suspect to refuse to answer."); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 12 (1949).

when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.").

There is no historical support for an interpretation of the privilege that would prevent sentencing courts from granting leniency to already-convicted defendants who have indicated their willingness to accept responsibility for their crimes and get on with their lives. Indeed, the commentators appear generally in agreement that the entire line of "penalty" cases stands on shaky historical ground. As Professor Leonard W. Levy, the foremost modern historian of the Fifth Amendment, has written:

> Decisions like *Slochower v. Board of Education* (1956) and *Garrity v. New Jersey* (1967) which protect against penalizing the invocation of the right or chilling its use, draw no clear support from the past. Indeed, the decision in *Griffin v. California* (1965) which prohibited comment on the failure of a criminal defendant to testify on [the] ground that such comment "is a remnant of the inquisitorial system" is historically farfetched.

L. Levy, *History and Judicial History: The Case of the Fifth Amendment*, in *Constitutional Opinions: Aspects of the Bill of Rights* 193, 208 (L. Levy ed. 1986). See also Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671, 707 (1968) ("Nothing in the historical development of the privilege suggests that threatened loss of employment was the kind of compulsion against which the amendment aimed to protect; the 'compulsions' of concern to the framers were torture, bullying and imprisonment for contempt.").

2. For similar reasons, the purposes of the privilege do not require invalidation of the sentencing

practices at issue in this case. The Court and commentators have emphasized that the principal purpose served by the Fifth Amendment privilege is to "proscribe[] state intrusion to extract self-condemnation," *Couch*, 409 U.S. at 327; that is, the privilege is designed to ensure that the government "may not by coercion prove a charge against an accused out of his own mouth." *Malloy* v. *Hogan*, 378 U.S. 1, 7-8 (1964). See also *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 414-416 & n.12 (1966); Friendly, *supra*, 37 U. Cinn. L. Rev. at 686-695; R. McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193, 206-214; 8 *Wigmore on Evidence* § 2251 (McNaughton rev. ed. 1961). The Court has cautioned, however, that the privilege "has never been given the full scope which the values it helps to protect suggest." *Schmerber* v. *California*, 384 U.S. 757, 762 (1966). See also *Fisher* v. *United States*, 425 U.S. 391, 399-401 (1976). Thus, as the Court observed in *Couch*, "[i]t is important, in applying constitutional principles, to interpret them in light of the fundamental interests in personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws." 409 U.S. at 336.

Nothing about the practice of extending lenient treatment to criminal defendants who accept responsibility for their criminal conduct conflicts with the central purposes of the privilege. There is no suggestion in this case that respondent was subjected to physical or mental abuse or mistreatment in an effort to obtain his "confession," or that the requirement that he admit his wrongs to obtain treatment was a subterfuge for obtaining incriminating evidence as

part of an ongoing criminal investigation preparatory to a future prosecution.[7] Nor was respondent presented with the "cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

To be sure, respondent's failure to accept responsibility for his crime did eventually lead to the revocation of his probation. But his five-year prison sentence was imposed because he sexually molested a seven-year-old girl, not because he refused to admit his guilt. Respondent was not ordered to confess, or required to make incriminating statements under oath, or held in contempt, or sentenced to an additional prison term because of his silence; instead, he simply chose not to comply with a condition precedent to his continued enjoyment of probationary status and was therefore denied that status.[8]

3. The importance and nature of the government interests at stake also militate against any finding of

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[7] Cf. *Skinner* v. *Railway Labor Executives Ass'n*, 489 U.S. 602, 620-621 & n.5 (1989) (upholding employee drug testing program against Fourth Amendment challenge, in part because there was no evidence of intent to use the test results for criminal prosecutions or that the purported goals of testing were pretexts for criminal investigation); *New York* v. *Burger*, 482 U.S. 691, 716-717 n.27 (1987) (rejecting Fourth Amendment challenge to administrative search, in part because the State "had proper regulatory purposes for enacting the administrative scheme and was not using it as a 'pretext' to enable law enforcement authorities to gather evidence of penal law violations.").

[8] Nor is any concern for the protection of innocent persons implicated here: respondent had already been found guilty of felony sexual assault by a jury, and there was no effort to obtain information from him beyond that relevant to the transaction giving rise to his criminal conviction.

a Fifth Amendment violation here. See *Jenkins* v. *Anderson*, 447 U.S. at 238 ("In determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice."). There can be no question that the practice of extending lenient treatment to criminal defendants who accept responsibility for their crimes is a legitimate and commendable one. This Court has recognized that cooperation with law enforcement authorities is laudable and may be taken into account at sentencing. *Roberts* v. *United States*, 445 U.S. 552, 557-558 (1980). Similarly, a defendant's willingness to accept responsibility for his criminal conduct demonstrates "that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Brady* v. *United States*, 397 U.S. 742, 753 (1970); see also *Gollaher* v. *United States*, 419 F.2d 520, 530 (9th Cir.), cert. denied, 396 U.S. 960 (1969) ("[T]he first step toward rehabilitation of an offender is the offender's recognition that he was at fault."). "Not only for society, but for the wrongdoer himself, 'admissio[n] of guilt . . ., if not coerced, [is] inherently desirable,' *United States* v. *Washington*, 431 U.S. 181, 187 (1977), because it advances the goals of both 'justice *and* rehabilitation.' *Michigan* v. *Tucker*, 417 U.S., at 448, n. 23 (emphasis added)." *Minnick* v. *Mississippi*, 111 S. Ct. 486, 498 (1990) (Scalia, J., dissenting). Thus, the State's purpose in encouraging acceptance of responsibility is unquestionably valid and is entitled to substantial weight.

Moreover, it is of considerable significance that the State's justification for encouraging acceptance of

responsibility is unrelated to any criminal investigative or prosecutive purpose. In holding that the *Griffin* rule forbidding comment on a defendant's silence was inapplicable to prison disciplinary hearings, this Court reasoned that "[i]n criminal cases, where the stakes are higher and the State's sole interest is to convict, *Griffin* [applies] * * *. Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime." *Baxter* v. *Palmigiano*, 425 U.S. 308, 318-319 (1976). Thus, where the government acts for reasons unrelated to any purpose to obtain further convictions against the defendant, an indirect burden on the privilege should not be regarded as constituting an impermissible compulsion.

Respondent's probation was not conditioned on the successful completion of sexual offender treatment because of any purpose to obtain incriminating statements "from [respondent's] own lips" for use in future prosecutions. *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 284 (1968). Instead, the sentencing judge quite properly sought to foster respondent's rehabilitation and facilitate his early return to normal society while at the same time respecting the public's rightful expectation that convicted criminals will not be put back on the streets without at least some attempt to minimize the likelihood of recidivism. The State acted for rehabilitative purposes wholly unrelated to the investigative and prosecutive efforts against which the Fifth Amendment privilege is intended to protect; thus there is no justification for finding "compulsion" in the State's offer of probation conditioned on respondent's willingness to admit his offense.

### C. Extension Of Leniency To Criminal Defendants Who Accept Responsibility For Their Criminal Conduct Does Not Constitute A "Penalty" Imposed On Criminal Defendants Who Choose To Exercise Their Right To Remain Silent

1. There are a host of situations in which the Court has found that burdens placed on the Fifth Amendment privilege do not amount to impermissible penalties on the assertion of the right. Most analogous to the instant case is the choice presented to a criminal defendant who is offered a lenient sentence in exchange for a guilty plea. In that situation, the pressure on a defendant to waive his right to remain silent may be substantial, particularly where the potential sentence on conviction is much more severe than the sentence offered as part of the plea bargain. Nonetheless, this Court has refused to find that the pressure inherent in plea bargaining constitutes an impermissible penalty or burden on the exercise of the Fifth Amendment privilege.

Thus, in *Brady* v. *United States*, 397 U.S. 742 (1970), the Court "decline[d] to hold * * * that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty," even though by pleading guilty the defendant was able to avoid the possibility of receiving the death penalty. 397 U.S. at 751. In *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), the Court reaffirmed the validity of plea bargaining even while recognizing that "confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights.' " 434 U.S. at 364. And *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978), confirmed "that a State may encourage

a guilty plea by offering substantial benefits in return for the plea." 439 U.S. at 218-219.

It is impossible to fashion a coherent theory of the Fifth Amendment that permits plea bargaining—despite its powerful "discouraging effect" on assertion of the privilege—yet otherwise forbids conditioning a lenient sentence on a defendant's willingness to accept responsibility for his criminal conduct.[9] Just as a guilty plea is "itself[] a consideration in sentencing" for which "a State may make due allowance in its sentencing decisions," *Corbitt* v. *New Jersey*, 439 U.S. at 224-225 nn. 14 & 15, so a defendant's acceptance of responsibility for his crimes—whether by way of guilty plea or otherwise—is a valid sentencing factor that the States and the federal government should be able to take into account in selecting appropriate punishments. Because a defendant's willingness to confess his guilt is rationally related to his prospects for rehabilitation, lenient treatment is both appropriate and constitutionally permissible.

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[9] It could be argued that plea bargaining imposes less of a burden on the privilege than does the requirement that a defendant accept responsibility for his conduct in order to obtain leniency, because a defendant who is offered a plea bargain knows that he may be able to avoid any punishment at all by remaining silent and securing an acquittal at trial. That argument does not hold up to analysis, however. It suggests that the "compulsion" inherent in a particular choice increases with the attractiveness of the option that requires surrendering the privilege. Under that reasoning, an especially attractive plea bargain would be deemed impermissibly coercive. The government would be prohibited from offering especially good bargains to a defendant, or from offering any bargain at all to a defendant with no realistic chance of acquittal. Nothing in any of this Court's plea bargaining cases provides even the remotest support for such a curious doctrine.

See *Brady* v. *United States*, 397 U.S. at 753. This Court's validation of plea bargaining thus compels the conclusion that the State has not imposed an impermissible penalty on the assertion of respondent's Fifth Amendment right.[10]

This calculus is not affected by the fact that acceptance of responsibility may, in some circumstances, entail more than a simple admission that the defendant committed the crimes of which he has been convicted. In this case, for example, in order to obtain treatment respondent would have had to admit his guilt not only of the crime of conviction but of perjury as well. Pet. App. 14a.[11] The theoretical possibility that a defendant's disclosure may come back to haunt him in a future prosecution does not transform the State's offer of leniency into impermissible "compulsion" any more than the certainty of conviction resulting from a guilty plea renders the plea

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[10] See *Corbitt* v. *New Jersey*, 439 U.S. at 223-224 ("There is no doubt that those * * * defendants who are willing to plead *non vult* may be treated more leniently than those who go to trial, but withholding the possibility of leniency from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed. Those cases * * * unequivocally recognize the constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based."); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("[I]n the 'give-and-take' of plea bargaining, there is no * * * element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.").

[11] Similar situations arise under the Sentencing Guidelines, which require acceptance of responsibility for "the offense and related conduct." Sentencing Guidelines § 3E1.1, Application Note 1(c); see note 3, *supra*. Cf. *State* v. *Gleason*, 576 A.2d 1246 (Vt. 1990).

bargaining process unconstitutional.[12] Because the denial of leniency to those defendants who choose to remain silent does not rise to the level of compulsion within the meaning of the Fifth Amendment, the privilege is not violated even if defendants cannot qualify for leniency without accepting responsibility for crimes beyond those for which they have been convicted.

2. The so-called "penalty" cases are not to the contrary. On the most obvious level, those cases are distinguishable because they involve burdens on the right to remain silent—for the most part, "the threat of the loss of employment," *Lefkowitz* v. *Turley*, 414 U.S. at 85—that are not involved in this case, and that are less analogous to the dilemma faced by respondent than is the practice of plea bargaining already validated by this Court.

Moreover, the "penalty" cases generally have involved factual scenarios much closer to those that gave rise to the Fifth Amendment privilege, in that the State was threatening imposition of a "potent sanction[]," *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 805 (1977), on individuals who refused to provide evidence against themselves as part of an ongoing investigation into potential wrongdoing. See, *e.g.*, *Garrity* v. *New Jersey*, 385 U.S. 493, 494 (1967);

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[12] Like an admission of criminality made in the sentencing context, a guilty plea is a judicial admission of criminal conduct that can be used against the defendant for a variety of purposes in future prosecutions. Thus, a guilty plea and a defendant's acceptance of responsibility for related criminal conduct may both be incriminating with respect to other potential criminal charges. Nonetheless, neither is "compelled" within the meaning of the Fifth Amendment merely because each is induced by the prospect of leniency.

*Spevack* v. *Klein*, 385 U.S. 511, 512-513 (1967); *Gardner* v. *Broderick*, 392 U.S. 273, 274-275 (1968); *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 281-283 (1968); *Lefkowitz* v. *Turley*, 414 U.S. 70, 75-76 (1973); *Lefkowitz* v. *Cunningham*, 431 U.S. at 803-804. In each of those cases, the penalty was imposed solely for assertion of the privilege, thus proving that the individuals' "testimony was demanded * * * in part so that it might be used to prosecute" them. *Gardner*, 392 U.S. at 279; see also *Sanitation Men*, 392 U.S. at 283-284. The "penalty" cases thus involved violations of the settled principle that "for an agent of the State to pursue a course of action whose *objective* is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (citations omitted) (emphasis added); see also *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30, 33 n.20 (1973) ("[I]f the only objective of a state practice is to discourage the assertion of constitutional rights it is ' "patently unconstitutional." ' ").[13]

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[13] The Court's dictum in *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), that "the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege," 465 U.S. at 438, must be read in a similar vein. See also *id.* at 435 ("[I]f the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation."). The *Murphy* Court was addressing the situation in which the State explicitly uses the threat of probation revocation to compel a probationer to provide incriminating evidence to assist the State's investigation of other criminal conduct. Where, as in this case, acceptance of responsibility is required in order to qualify for lenient sentencing treatment, the State's objective is not to gather evidence of guilt for use in future prosecutions or to penalize the assertion of the privilege, but rather to serve

In this case, by contrast, there is no suggestion that respondent was the subject of any ongoing criminal investigation, or that the State sought to obtain incriminating statements from him for use in future criminal proceedings. Nor did the State engage in any "course of action whose objective [was] to penalize [respondent's] reliance on his" Fifth Amendment right.[14] *Hayes*, 434 U.S. at 363. Rather, the sentencing judge merely reinstated the original prison sentence imposed for respondent's crime because respondent had failed to demonstrate that he qualified for more lenient treatment. Accordingly, there is no basis for extending the rationale of the "penalty" cases to the very different context of this case, and the logic of this Court's plea bargain cases compels the conclusion that respondent has not been impermissibly penalized for any assertion of his privilege against compelled self-incrimination.

**D. Government May Withhold Discretionary Benefits From Individuals Who Fail To Prove They Are Entitled To Those Benefits Even If Their Failure Is Attributable To The Assertion Of Their Fifth Amendment Privilege**

Respondent had no statutory or constitutional right to have his five-year prison sentence suspended in favor of probation.[15] The sentencing court exercised

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valid penological considerations militating in favor of lenient treatment of convicted criminals who acknowledge their prior criminal conduct.

[14] Indeed, respondent did not assert his Fifth Amendment privilege at all, but instead affirmatively denied committing the crime for which he had been convicted.

[15] See Mont. Code Ann. § 46-18-201(1) (1989) (sentencing court "may" suspend sentence and impose probation conditions in lieu of prison term).

its discretion to give respondent a chance to avoid prison on certain conditions. Pet. App. 19a-20a. In effect, the court offered respondent the opportunity to stay out of prison as long as he demonstrated that he was qualified to enjoy that privilege by complying with the conditions of his probation, including sex offender counseling. The burden was on respondent to enroll in and complete the required course of counseling and therapy.[16]

Respondent failed to meet that burden. His unwillingness to comply with the prerequisites to successful completion of therapy led him to violate a condition of his probation, and thus prevented him from showing that he had earned any leniency from the court.[17] The court's order revoking his probation was therefore an entirely legitimate response to respondent's failure to demonstrate that he continued to qualify for probationary status.

To be sure, respondent's failure to meet his burden under the probation order was, according to the state supreme court, the direct result of the exercise of his right against compelled self-incrimination. Pet. App. 8a, 14a-15a. That fact does not, however, convert the judge's revocation of probation from what it clearly was—a legitimate response to respondent's failure to

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[16] Similarly, under the Sentencing Guidelines, the burden is on convicted defendants to demonstrate that they are entitled to the two-level reduction in offense level for acceptance of responsibility. See, *e.g.*, *United States* v. *Mourning*, 914 F.2d 699, 705 (5th Cir. 1990).

[17] The State apparently bore the burden of proof at the revocation hearing, see Pet. App. 22a-23a, but it is clear that respondent had the initial burden of complying with the conditions of his probation by enrolling in and completing therapy.

demonstrate that he was deserving of leniency—into a penalty for invocation of the Fifth Amendment privilege. To the contrary, the fact that respondent was unable to satisfy the conditions of his grant of probation is fatal to his Fifth Amendment claim.

This Court has held that the Fifth Amendment privilege is not implicated when an individual's claim to a government benefit is rejected because his assertion of the privilege prevents him from establishing his entitlement to that benefit. In *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), for example, the Court upheld the denial of a commission to an Army doctor who, but for his refusal to say whether he had ever been associated with subversive organizations, would have received a commission. The Court rejected the doctor's claim that he had been penalized for his assertion of his Fifth Amendment rights, stating:

> No one * * * questions or doubts [petitioner's] right to withhold facts about himself on this ground. No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question "No."

345 U.S. at 91. Similarly, in *Kimm* v. *Rosenberg*, 363 U.S. 405 (1960) (per curiam), the Court upheld an alien's deportation order because the alien had not proved that he was eligible for discretionary suspension of deportation, even though he claimed that his inability to prove his eligibility was due to the assertion of his Fifth Amendment privilege. The Court assumed without deciding that the alien's assertion

of the privilege was justified, but concluded that "this did not relieve him under the statute of the burden of establishing" his eligibility for discretionary suspension of deportation. 363 U.S. at 408.[18]

The same principle was applied more recently in *United States* v. *Rylander*, 460 U.S. 752 (1983). In that case, the Court upheld the imposition of contempt sanctions on a taxpayer who had asserted the privilege in lieu of producing evidence to demonstrate his inability to comply with a court order. The Court stated that "[w]e have squarely rejected the

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[18] *Kimm* was criticized by the plurality in *Spevack* v. *Klein*, 385 U.S. 511, 514 n.2 (1967), but neither *Kimm* nor *Orloff* has been overruled. In *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), the Court distinguished *Orloff*, stating: "[*Orloff*] differs significantly from the [case] before us since the State here asks the architects to affirmatively expose themselves to criminal prosecution by waiving their privilege against self-incrimination, or from *Garrity* [v. *New Jersey*, 385 U.S. 493 (1967)], where the threat of criminal prosecution was apparent both from the nature of the proceeding, and the absence of applicable state immunity statutes." 414 U.S. at 82 n.2. In this case, by contrast, *Orloff* is directly applicable. The State did not require respondent affirmatively to waive his privilege, as in *Turley*, nor was the State conducting an ongoing criminal investigation in an effort to gain evidence to use against respondent in a future prosecution, as in *Garrity*.

The Court in *Turley* also distinguished *Kimm*, noting that the alien's "imminent departure from the country, whether it was voluntary or compelled, obviously made the threat of criminal prosecution on the basis of his answer remote." 414 U.S. at 82 n.2. In fact, however, the alien's primary claim in *Kimm* was that he was eligible to be considered for discretionary suspension of deportation, not merely for voluntary deportation. Thus, his claim, if accepted, could have prevented his deportation. Nonetheless, while assuming that the alien had a valid basis for asserting his privilege, the Court in *Kimm* refused to overturn the deportation order.

notion * * * that a possible failure of proof on an issue where the defendant had the burden of proof is a form of 'compulsion' which requires that the burden be shifted from the defendant's shoulders to that of the government." 460 U.S. at 758. The Court rejected the notion that the taxpayer's assertion of the privilege protected him from being sanctioned for his failure to meet his burden, because such a rule "would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his." *Id.* at 758.

The *Rylander* Court was careful to distinguish the valid sanction imposed on the taxpayer for his failure to satisfy his burden from an impermissible penalty imposed for assertion of the privilege itself: "Rylander was not * * * incarcerated because he refused to submit himself to cross-examination by the Government at the contempt hearing. He was held in contempt for failure to comply with a previous order of the District Court." 460 U.S. at 760. By the same token, respondent was not incarcerated as punishment for his refusal to admit his guilt but for his "failure to comply with a previous order of" the sentencing court, an order setting forth obligations respondent had to satisfy if he was to maintain his status as a probationer.

*Orloff*, *Kimm*, and *Rylander* are controlling here. The decision whether to extend lenient treatment to convicted criminals is one properly committed to the discretion of the sentencing court. A State may lawfully conclude that convicted defendants have no right to probation or other forms of lenient sentencing treatment, but instead must come forward with

affirmative evidence demonstrating that they qualify for such special treatment. See *Corbitt* v. *New Jersey*, 439 U.S. at 224 (recognizing "the constitutional propriety of * * * not extending leniency to those who have not demonstrated those attributes on which leniency is based"). The defendants' assertion of the Fifth Amendment privilege may make it difficult or impossible for them to meet that burden, but the denial of leniency to those who fail to qualify for it cannot be equated with punishment for assertion of the privilege.

## CONCLUSION

The judgment of the Supreme Court of Montana should be reversed.

Respectfully submitted.

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